

Untitled

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

)

In the Matter of)

)

Order Instituting Rulemaking to Implement Certain) D.T.E. 99-18

Provisions of Massachusetts' Anti-Slaming Law,)

G.L. c. 93, §§ 108-113 and G.L. c. 159, § 12E.)

)

INITIAL COMMENTS OF CHOICE ONE COMMUNICATIONS L.L.C.

Choice One Communications L.L.C. ("Choice One") on behalf of its operating subsidiary in Massachusetts, Choice One Communications of Massachusetts Inc., by undersigned counsel, respectfully submits its Initial Comments on the Order Instituting Rulemaking (the "Order"), issued June 10, 1999 by the Department of Telecommunications and Energy (the "Department") in the above-referenced proceeding.

I. Introduction

Choice One offers a comprehensive, fully-integrated package of local telecommunications service, long distance, data Internet and high-speed digital subscriber line (DSL) solutions to its customers. Choice One, through its operating subsidiaries, currently provides service in Providence, Rhode Island, Pittsburgh, Pennsylvania, and in Syracuse, Buffalo and Albany, New York. Its Massachusetts operating subsidiary recently received authority to provide service in the Commonwealth and will soon offer service to Massachusetts consumers.

Choice One welcomes the initiative on the part of the Department to address the important problem of unauthorized carrier changes, known in the telecommunications industry as "slaming." Choice One supports the bulk of the rules and regulations set forth in the Order and hopes that the rules and regulations are effective in eliminating bad actors from the Massachusetts market. Slaming is an unintended consequence of opening markets to competition and certainly carriers that willfully and recklessly engage in this behavior should be punished. However, Choice One is concerned that the alternative dispute resolution procedure, as set out in the Order, threatens to cause substantial harm to carriers that diligently monitor the provision of their services.

II. Alternative Dispute Resolution Procedure for Slaming Complaints

The Department's Order proposes to establish an informal procedure for resolving slaming complaints. The proposed Section 13.05 allows for customers to initiate a

Untitled

complaint by filing with the Consumer Division of the Department and electing an informal dispute resolution procedure. While Choice One agrees with the Department that there should be some method for customers to resolve complaints in an informal manner, the proposed section is problematic for a number of reasons.

Choice One is concerned that the investigative procedure, set out in Proposed Section 13.05(1)(b), does not implement a process for providing notice to a carrier that is under investigation by the Department. The only time the Department would be obligated to notify the carrier is after the investigation concludes and a final determination is made. (1) Choice One respectfully requests that the Department revise the rule so that carriers are put on notice when a complaint is filed and have due process opportunity to participate in the resolution or the result.

There are many reasons why carriers should receive such notice. First, carriers should have the opportunity to provide the Department with information demonstrating that the carrier change was in fact an authorized change as defined by Proposed Section 13.04. While the procedures the Department proposes to implement will certainly provide consumers with additional protections, there still may be instances where a consumer believes they have been slammed even though a carrier followed proper procedures. This is recognized by Proposed Section 13.05(1), which does not condition a customer's filing of a complaint in only those instances where a carrier did not obtain a valid authorization, as defined by Proposed Section 13.04. Thus, providing a carrier timely notice of complaints filed against it would allow customers, carriers and the Department to resolve the problem in a much more efficient manner where the carrier obtained a valid authorization.

Implementing such a procedure in other circumstances would also allow the customer and the carrier to attempt to resolve the complaint independently without need for the Department to intervene. When carriers and customers are able to resolve the dispute without the Department's involvement, all parties benefit. Carriers are able to improve their customer relations and tailor their business practices to ensure that such problems do not continue to occur. It also avoids placing a carrier into an adversarial setting that is not conducive to solving the problem at hand. Customers benefit as they are able to get a quick resolution to their problem. Finally, the Department's resources are conserved so that it can focus on more problematic situations.

Choice One further requests that the Department revise its definition of an unauthorized change, found in Proposed Section 13.04(1). As it currently reads, any interexchange carrier or local exchange carrier that initiates a change is potentially liable under the Department's proposed rules. However, in most instances, there are at least two parties involved, the carrier requesting the change and the carrier that affects the requested change. For example, it is unclear whether the Department's proposed rules would apply to both carriers, or only to the requesting carrier. Thus, Choice One respectfully requests that the Department revise the rules to clearly indicate that only the carrier that requests the change is subject to the slamming rules.

Choice One is also concerned about the sanctions set out in Proposed Section 13.05(2). Carriers face potential penalties of up to \$3,000 for each finding against the carrier. Importantly, under the rules as drafted, after a first slam, the Department could be obligated to impose a fine of between \$2,000 and \$3,000. (2) Each finding would also count towards the limit of 20 unauthorized carrier changes in a 12 month period. Once a carrier exceeds that limit, the Department may prohibit the carrier from selling telecommunications services in Massachusetts. In determining the length of the suspension, the Department will consider "the nature, circumstance and gravity of the violation, the degree of culpability, and the carrier's history of prior offenses." Proposed Section 13.05(2).

Choice One is gravely concerned that the results of an alternative dispute resolution process could end in a substantial monetary forfeiture or in a suspension of a carrier's authority to provide telecommunications services in the Commonwealth of Massachusetts. While the underlying statutory provision allows for such penalties

Untitled

only after the demands of due process are met, the Department's proposed sanctions, following an informal adjudicatory process, do not contain such protections. (3) The problem is that the proposed rules link the alternative dispute resolution process with monetary forfeitures and the suspension of a carrier's certificate. Such a connection was not contemplated by the statute and coupling the two results in violating due process. (4)

III. Further Concerns Regarding the Sanction Provision

Choice One is aware of an instance in which a carrier effectively slammed hundreds of customers through no fault of its own. A small local exchange carrier in a rural state, within the last year, implemented long-distance pre-subscription. Customers were balloted as to their choice of provider. Inadvertently, the long distance carrier was told, wrongly, that several hundred customers had chosen the carrier as their long distance provider. The information had come from an Incumbent Local Exchange Carrier, which changed the customers primary interexchange carrier.

As defined by the Department's proposed rules, the customers were legally "slammed." (5) Thus, under the Department's proposed rules, there were several hundred instances of slamming which would result in hundreds of thousands of dollars in penalties. These sanctions would be mandatorily imposed even though the carrier was not at fault. The Department's formalized rules for levying sanctions against carriers subject carriers to strict liability. Choice One believes that the rules ultimately adopted by the Department should allow the Department more flexibility to determine whether, given the totality of the circumstances, a penalty is warranted.

IV. Conclusion

Choice One supports the majority of the proposed rules promulgated by the Department because the rules promise to decrease customer confusion and empower Massachusetts consumers to exercise their rights. However, Choice One has a number of concerns in regard to the Department's proposed alternative dispute resolution procedure. Specifically, Choice One proposes that the Department modify the alternative dispute resolution procedure to provide timely notice to carriers of any complaints filed against it by consumers seeking to utilize the alternative dispute resolution process. Choice One also requests that the Department clarify its definition of an unauthorized change to make clear that the only carrier subject to the slamming rules is the one requesting the change and not the carrier that actually implements the carrier change. Choice One further proposes that the Department eliminate sanctions from the alternative dispute resolution process. In order to impose sanctions, the Department must afford carriers the protections guaranteed by due process of law. Finally, Choice One proposes that the Department allow discretion and not subject carriers to strict liability when the Department ultimately determines the appropriate sanction provisions.

Choice One respectfully requests that the Department revise the proposed rules and regulations for the reasons and to the extent set forth above.

Respectfully submitted,

Dana Fri x

Ronal d W. Del Sesto, Jr.

Swi dler Berl in Shereff Friedman, LLP

3000 K Street, NW, Sui te 300

Washi ngton, D.C. 20007

(202) 424-7500 (Tel .)

(202) 424-7645 (Fax)

Attorneys for Choi ce One Communi cati ons L. L. C. and Choi ce One Communi cati ons of
Massachusetts Inc.

Kim Robert Scovi l l

VP Legal and Regul atory Affai rs

Choi ce One Communi cati ons, Inc.

100 Chestnut Street, Sui te 700

Rochester, NY 14604-2417

Dated: June 30, 1999

)

In the Matter of)

)

Order Insti tuting Rulemaking to Implement Certain) D.T.E. 99-18

Provi si ons of Massachusetts' Anti -Sl ammi ng Law,)

G.L. c. 93, §§ 108-113 and G.L. c. 159, § 12E.)

Untitled

)

)

CERTIFICATE OF SERVICE

I certify that on this 30th day of June 1999, true and correct copies of the foregoing Initial Comments of Choice One Communications of Massachusetts Inc. were served upon the following by e-mail and overnight mail:

Mary L. Cottrell

Secretary

Massachusetts Department of Telecommunications and Energy

100 Cambridge Street, 12th Floor

Boston MA 02202

Telephone: 617-305-3500

Facsimile: 617-723-8812

1. "Upon reaching a final conclusion, the Department shall notify all parties to the dispute of the Department's determination." Proposed Section 13.05(1)(b).
2. See Proposed Section 13.05(2)(a). The relevant portion provides "and not less than \$2,000 nor more than \$3,000 for any subsequent offense." Id.
3. See Mass. Gen. Laws ch. 93, § 112(c) (1998).
4. See id. §§ 110(k), 112. While the statute provides the Department with discretion to promulgate rules and regulations to "establish an alternative informal procedure," a separate section details the sanctions that may be imposed. Id. § 110(k); See id. § 112. Choice One respectfully notes that Section 112(c) of M.G.L. c. 93 provides that a telecommunications carrier may "be prohibited from selling telecommunications services in the Commonwealth for a period of up to one year." Id. § 112(c) (emphasis added). It is unclear from the Department's wording of Proposed Section 13.05(2) that the maximum length of suspension that the Department can impose is one year. Choice One respectfully requests that the Department revise any sanctions that it ultimately adopts to reflect this statutory limitation.
5. See Proposed Section 13.04(1).